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LAND
STATE PARKS

March 24, 2006

Ms. Aulani Wilhelm
Acting Reserve Manager
Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve
6600 Kalanianaʻole Highway, Suite 301
Honolulu, Hawaii 96825

Dear Ms. Wilhelm:

SUBJECT: State of Hawaii Comments on the Draft of the Proposed Sanctuary Regulations for the Northwestern Hawaiian Islands (NWHI)

Thank you for the opportunity to provide comments on the proposed Sanctuary regulations. Our comments are included herein for your consideration.

General Comments:

Overall the proposed regulations are directly in line with our position. We are happy to see that the key issues that have been raised by the State are included for consideration.

In the background section, there is reference to a Memorandum of Understanding (MOU) that was developed by the Interagency Ecosystem Task Force in 1995. It applies a geographic framework under which ecological boundaries are defined and states that the Department of Commerce and the Department of Interior are committed to working with the State of Hawaii utilizing an ecosystem approach. While we agree with the need to manage the NWHI using an ecosystem-based approach, we have not seen the MOU that is described as the basis for this approach and would like to have a clear understanding of the previous efforts.

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There needs to be a new section added to the preamble that outlines and clearly states that these regulations in no way supersede or trump regulations already in place under the authorities of the jurisdictional partners, the State of Hawaii and the U.S. Fish and Wildlife Service (USFWS). The overall premise of these regulations should be that they are consistent with other applicable laws and authorities.

As you are aware, the State of Hawaii has recently created a State Marine Refuge in all State waters from 0 - 3 miles around all the islands and atolls of the NWHI, except Midway Atoll National Wildlife Refuge (Midway). Our regulations require that all entries into State waters require an access permit that is granted by the Board of Land and Natural Resources. We have established a permit review committee to review these permits and asked that all jurisdictional partners be a part of this review process. A key consideration for our review is that biological and cultural resource considerations are of equal importance.

The proposed general procedures for submitting and reviewing permits under the Sanctuary designation are different, both in terms of the criteria or findings used to access and review permits and who has the authority to grant the permits.

While most of the findings for the Sanctuary review of permits are very similar, some of our permit guidelines are more specific. We need to resolve this.

It appears that, at least for the short term, the best we will be able to hope for is a permit application that is the same for all agencies with a parallel review and approval process.

Specific Comments:

1. PREAMBLE:

Page 31, Paragraph 2 states that the only documented small businesses operating in the NWHI are eight federally permitted commercial bottomfish fishermen.

While these are the only federally permitted fishermen, there was a small fleet comprised of a few boats that fished for tuna, called the ikashibi fleet, that also operated in the NWHI in the past. We would like to see some mention of these fishermen in the summary of impacts.

2. DEFINITIONS:

a. Under the Definitions section, there are no definitions for research, education, and several other classes of permits. It would help to have these definitions also included to ensure consistency.

b. **"Attract or attracting"** means luring or attempting to lure a living resource by any means, except the mere presence of human beings (e.g. swimmers, divers, boaters). It is difficult to determine why this definition is included here or what activities it might pertain to, except perhaps for commercial purposes, such as extreme sports

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(swimming with sharks, swimming with dolphins, etc.). Any activity that involved attracting wildlife would be in potential conflict with State rules that seek to ensure "...conservation and natural character for present and future generations," as well as the non-commercial requirement of the permitting guidelines and the requirement to show benefit to the ecosystem. Although the Executive Order (EO) allows "chumming material or bait" for "authorized fishing operations" in Section (b) (4), these rules would potentially allow it for any use.

It should be explained why this definition is in the proposed rules and to which activities it applies.

- c. **Ecological Reserve** is a category of protected area not included in the original EO. At issue is whether the Ecological Reserves for the Sanctuary supplement or complement the Reserve Protection Areas granted permanent protection by the original EO.

The purpose of the Ecological Reserve category should be clarified, and maps should be provided.

- d. **The Native Hawaiian Practices** definition needs to be tightened. The last sentence should read: "This may include, but is not limited to, the non-commercial use of Sanctuary resources for direct personal consumption while in the Sanctuary and may be subject to limits on harvest."

Native Hawaiian practices as indicated on Page 40 means "... cultural activities for the purposes of perpetuating traditional knowledge, caring for and protecting the environment, and strengthening cultural and spiritual connections to the NWHI that have demonstrable benefits to the Native Hawaiian community. This may include, but is not limited to, the non-commercial use of Sanctuary resources for direct personal consumption while in the Sanctuary."

State rules specify that, "it is unlawful for any person ... to take for the purpose of sale or sell marine life taken from the refuge," therefore, language pertaining to the ban on commercial extraction should be added to this definition. The State's permitting guidelines require that activities "must be non-commercial and will not involve the sale of any organism, byproduct, or material collected." In addition, the definition of Native Hawaiian Subsistence Uses provided by the National Oceanic & Atmospheric Administration (NOAA) in the September 2004 draft Sanctuary regulations (Page B-3 of "Advice and Recommendations on the Development of Draft Fishing Regulations Under the NMSA, Section 304(a)5)," September, 2004) included the following statement, "It does not include the sale of any marine resources." This has been removed from the current document. The original EO in Section 4(c) allows only for "Culturally significant, noncommercial subsistence, cultural, and religious uses by Native Hawaiians" and states that these uses should be

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allowed within the Reserve, consistent with applicable law and the long-term conservation and protection of Reserve resources."

To eliminate any potential conflicts with State rules and the original EO, it is suggested that the phrase, "This does not include commercial activities or the sale of any marine resources" be added to this definition.

- c. **Special Ocean Use** means an activity or use "...engaged in to generate revenue or profits for one or more persons associated with the activity, and does not destroy, cause the loss of, or injure Sanctuary resources." Page 23 indicates that this could include commercial photography, commercial dive operations, and/or commercial wildlife viewing tours. Page 49 indicates that it could include "sport fishing." In fact, it could include any for-profit activity and no non-profit activities. It is also noted on Page 24 that the Sanctuary may collect a fee representing "the fair market value of the use of the Sanctuary resource."

Potentially, such permits could be issued throughout the archipelago for any sort of commercial activity. State rules only allow three use categories: a) Research/Education, b) Native Hawaiian, and c) Non-extractive purposes undertaken to further the knowledge of resources or which provides for enhanced resources protection or resource management. The Special Ocean Use permit category should indicate that this permit type is "initially restricted to Midway alone, and only if the activity has been identified as a compatible use through a USFWS compatibility determination" as indicated on Page 23, at the bottom of the second full paragraph.

- f. **Sport Fishing** is defined as "payment of a fee to engage in non-commercial fishing activity in the Sanctuary." **Recreational Fishing**, by contrast, is defined as fishing "conducted for personal enjoyment, no fee for service." It is difficult to understand why this distinction is necessary, except perhaps to regulate activities at Midway. **It should be clarified as to why it is necessary to have separate definitions for "sport" versus "recreational" fishing in this document.**

If there is a need to keep the definitions separate, the **Sport Fishing definition should be rewritten**. How can a payment of a fee to engage in fishing activities NOT be considered commercial?

Instead of the definition proposed, we suggest, "payment of a fee to engage in a vessel-based fishing activity using hook and line techniques, in the Sanctuary, where the catch is not for sale or barter."

- g. Under the definition of **Sustenance Fishing** include "fishing for bottomfish or pelagic species **outside of the SPAs**, in which all the catch is consumed within the Sanctuary ..."

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- h. **Midway Special Management Area (SMA)** defines an area within the sanctuary, and overlaying Midway. Midway is not part of the Reserve established by the EO, so the Midway SMA would be a supplement to the Reserve.
It should be clarified as to whether or not this designation would allow or encourage activities presently considered by the USFWS to be incompatible with the purposes of Midway.

- i. **Ocean-based Ecotourism** is defined as "for service activities" to include visiting the Sanctuary for "study, enjoyment, or volunteer assistance for purposes of conservation and management." The inclusion of "enjoyment" as a sufficient criterion for an activity to qualify as ocean-based tourism would appear to allow any ocean-based visit, such as that provided by cruise ships, to qualify, as "ecotourism" as long as people enjoyed the trip.
It is suggested that the word "enjoyment" allows an overly broad interpretation of ocean-based ecotourism, and should be deleted from this definition.

3. REGULATIONS

a. **Prohibited Activities:**

- 1) There are a number of philosophical inconsistencies with State rules in Section 922.203, regarding prohibited or otherwise regulated activities. The State stipulates a prohibition on "any activity that is not authorized by this chapter" i.e., in State waters, everything is prohibited unless specifically permitted (in State's case science/education, Native Hawaiian, non-extractive conservation, etc.). By contrast, the proposed NWHI Sanctuary language allows any activity to occur unless explicitly prohibited.
To resolve this philosophical conflict, there is a need to modify the introductory language in this section to indicate that "any activity not authorized below is prohibited." The number and type of activities to be permitted should then be reduced to be consistent with allowable uses in State waters, as clarified by the State's recently issued permitting guidelines. Permitted activities should be limited to those permitted by the State in State waters, as described in the State rules and permitting guidelines.
- 2) Under Section (a) (1) (i), the wording should read "as provided in paragraphs (e) through (g) NOI (d).
- 3) **"Anchoring or having a vessel anchored on any living coral."** State rules prohibit "engaging in any activity, including the anchoring of a vessel that can or does result in damaging or destroying coral." This differs from the original EO, which prohibits anchoring on any living or dead coral "when

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visibility is such that the seabed can be seen." The proposed Sanctuary language is more permissive by only prohibiting anchoring on live coral, but is less permissive by not limiting the prohibition to only areas where the seabed is visible. How one would know whether or not the anchor is on live coral when the seabed is not visible (or when the seabed consists of live coral interspersed with dead coral) is not clear.

The rule regarding anchoring on coral should be reworded to be consistent with the stricter State rules.

h. Regulated Activities (allowable):

Section (c) (6) (i) and (ii) Regulated Activities lists certain discharges that would be allowed outside of SPAs, including "bilge water" and "... any other pollutant discharge from the operation of a marine propulsion system, shipboard maneuvering system, crew habitability system, or from a protective, preservative, or absorptive application to the hull of the vessel." This proposal significantly expands the categories of exemptions beyond those contained in the original EO, and the exemption of "any pollutant" associated with the various "systems" listed, including a "crew habitability system," which seems quite broad. As research traffic levels broaden, it will be important to ensure that dumping of pollutants inside protected areas does not increase.

It is suggested to include on the list of prohibited activities which may not be allowed by permit, "discharging or depositing" except for (From EO 13196, Sec 4) "fish parts (i.e., chumming material or bait) used in and during authorized fishing operations (if any); biodegradable effluent incident to vessel use and generated by a marine sanitation device in accordance with Section 312 of the Federal Water Pollution Control Act; water generated by routine vessel operations, excluding oily wastes from bilge pumping; cooling water from vessels or engine exhaust."

c. Permitted Activities:

- 1) **Commercial fishers** also appear exempted from the paragraph (c) restrictions on anchoring.
The State suggests that a "no harm to coral" language be applied to fishers.
- 2) **Section 922.204 Permitting procedures and criteria** gives the Director (the Director of the National Marine Sanctuary Program or designee) wide latitude in the issuance of permits, limited only by the purposes and policies of the National Marine Sanctuary Act (NMSA) and the Goals and Objectives of the Sanctuary, and the requirement to make certain findings as a condition of granting a permit. Presumably the more restrictive of this combination

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would apply. The State's permit process requires a "do no harm," precautionary approach, based on resource conservation, public comment on all permits, and consideration of the applicant's history of prior violations. The language in this document ("sole discretion" of Director) does not specify any method of ensuring preservation of ecological integrity, and allows the Director issue a permit if he or she considers that it furthers educational value or assists conservation or allows recreational activities, special ocean use, sport fishing, recreational fishing. There appears to be no requirement for public notice, other than for Special Ocean Use permits, for any category of activity not previously identified as subject to the special use permit section of the NMSA for public notice. There also appears to be no requirement for an advisory panel of ecosystem scientists, public comments, or other means for public participation in the granting of the permits. The Director may issue a permit at "his or her sole discretion." Provisions for the above do not appear to be required under the regulations.

These rules differ greatly from those used by the State of Hawaii to evaluate and grant permits, and represent a potential conflict in regard to integrating management regimes.

- 3) **Permit Types:** The State of Hawaii allows only three permit types. The draft Sanctuary rules propose adding "recreational activities, special ocean use, sport fishing, recreational fishing," for a total of seven permit types. Thus, there is a large disparity in the number and type of permit types between the State and the Sanctuary. This will hinder efforts at co-management.

It is suggested that the Sanctuary reduce the number of permit types, or stipulate that certain permit types are restricted to Midway alone, and only if the activity has been identified as a compatible use through a USFWS compatibility determination.

- 4) **Findings:** This section places some constraints on the Director. However, instead of the state's "do no harm" standard, Section (c) (1) requires that the activity "can be conducted with adequate safeguards for the resources and ecological integrity of the Sanctuary" but does not require review panel of scientific experts. By contrast, the State rules stipulate a "do no harm" standard, a precautionary approach, conservation in natural character as the primary goal, and only allow three categories of access (see above). State permitting guidelines clarify the requirement that all activities are non-commercial and must have demonstrable benefits to preservation and management of ecosystem. The Sanctuary Goals and Objectives and the original EO also require long-term conservation in natural state and subjects all activities to consistency with that primary purpose.

The State suggests that this section utilize language in State permitting guidelines to replace "adequate safeguards" with:

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category currently limited to Midway. (See previous discussion in Section 2.)

The document should be clarified to indicate that sport fishing under a Special Ocean Use permit may occur only at Midway.

- 3) In the Definitions section, the term "Bottomfish Species" is over broadly defined. Earlier drafts of the Sanctuary regulations provided a short list of eight bottomfish species that are managed by the State as the basis for its restricted fishing areas; all of these species are true deep sea bottomfish. The new document returns to a long list, including certain coral reef dependent species that have previously been suggested for removal from the list of Bottomfish Management Unit Species; this appears to allow the Western Pacific Regional Fishery Management Council (WESPAC) to potentially manage additional taxa within the scope of the bottom fishery.

It is suggested that the list of Bottomfish Management Unit Species be revised to include only those eight that are recognized by the State of Hawaii as the basis for its bottomfish management plans.

- 4) The proposed total allowable catch (TAC) for bottomfish and pelagic species exceeds the current levels of fishing effort in the NWHI and, therefore, potentially allows an increase in fishing above current levels.

The State declines to propose an alternative TAC, but does suggest that total permits not be allowed to exceed the eight permits currently active (four in the Mau Zone and four in the Hoomalu Zone), which is less than the number proposed herein. As the fishery under this alternative will be phased out in five years, there is also no need to consider issuance of permits to Native Hawaiian bottomfishermen. The State also does not endorse the fishing regulations proposed by WESPAC, which exceed the bottomfish TAC proposed in these draft Sanctuary regulations (381,000 lbs./yr. proposed by WESPAC, versus 350,000 lbs./yr. proposed by Sanctuaries) and the maximum total number of bottomfish permits proposed herein (14 proposed by WESPAC versus 13 proposed herein). The State's position is to oppose any increase in fishing for any species above current levels.

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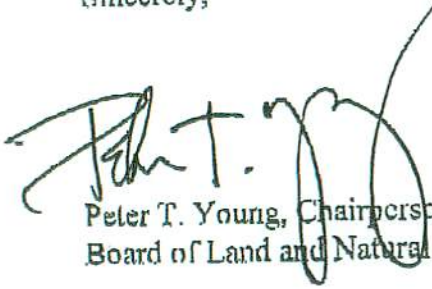
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Again, we appreciate the opportunity to comment on the proposed draft regulations and look forward to a continued partnership as we move forward into Sanctuary designation. If you have any questions on this document, please call me at (808) 587-0401.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter T. Young", with a large, stylized flourish extending from the end of the signature.

Peter T. Young, Chairperson
Board of Land and Natural Resources

Attachment